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No. 97-1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

ABBOTT LABORATORIES, et al.,

Petitioners,

v.

HJB, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR CLASS PLAINTIFF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The question presented in the petition for a writ of certiorari is not an accurate or fair statement of the issue involved in this case. The proper statement of the question presented is as follows:

> Where manufacturers and wholesalers enter into an industry-wide price-fixing conspiracy to overcharge retailers on all of their purchases of prescription drugs—including both drugs purchased directly from the manufacturers and drugs purchased from co-conspirator wholesalers—does the rule in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), preclude the retailers from recovery of overcharges on purchases made from the co-conspirator wholesalers?

RULE 29.6 STATEMENT

This Brief in Opposition is filed on behalf of several companies, all of which are named plaintiffs and class representatives in the class action pending in the district court. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Class Plaintiff Respondents state:

a. This Brief in Opposition is filed on behalf of the following corporations:

Endlers' Pharmacy, Inc.

Barry's Cut Rate Stores, Inc.

Brady's Pharmacy, Inc.

Brady's Enterprises, Inc.

Conney's Pharmacy, Inc.

Meyers Pharmacy, Inc.

Strathmore Pharmacy, Inc.

Pat-Y-Ken Drug, Inc.

Starko, Inc.

Lurie Pharmacy, Inc.

b. None of the corporations listed in paragraph (a) of this Statement has a parent company.

c. None of the corporations listed in paragraph (a) of this Statement has any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This is a class action brought on behalf of retail pharmacies throughout the United States alleging that most of the major drug manufacturers and the major drug wholesalers entered into an industry-wide conspiracy, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to fix, raise, maintain and stabilize the prices that retail pharmacies in this country pay for brand name prescription drugs.[1] Among other things, the complaint seeks to recover the unlawful overcharges that have been imposed upon the retail pharmacies by the conspiracy.[2] Jurisdiction of the district court was properly invoked under, *inter alia*, 28 U.S.C. § 1331.

After discovery was completed, both the manufacturers and the wholesalers filed motions for summary judgment, claiming that there was no evidence that a conspiracy operated in this industry; that even if a conspiracy could be shown to exist, there was no evidence to implicate the wholesalers in that conspiracy; and that, in any event, the rule in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), bars recovery on all sales made through

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[1] This petition was filed by several of the manufacturer defendants. Several other manufacturer defendants have already settled with the class. A companion petition for a writ of certiorari has been filed by the wholesalers, and is currently pending under the caption *AmeriSource Corporation v. HJB, Inc.*, No. 97-1148.

[2] On November 15, 1994, the Plaintiffs' claims were certified for treatment as a class action, with a plaintiff class including more than 40,000 retail pharmacies. Several thousand pharmacies opted out of the class and filed separate lawsuits, which were then consolidated with the class case for pretrial proceedings. This Brief in Opposition is filed on behalf of certain Class Plaintiffs.

the wholesalers. In response, Class Plaintiffs submitted evidence showing that the conspiracy in this case was designed to enable the manufacturers and wholesalers to charge supra-competitive prices to retail pharmacies, while keeping wholesalers involved in sales to retail pharmacies. The evidence showed that the conspiracy involved at least the following:

> (1) Defendants entered into a conspiracy to prevent retail pharmacies from purchasing brand name prescription drugs at discounts off the list prices for those drugs—a conspiracy that involved, first, an agreement among the wholesalers to oppose such discounts to retail pharmacies, second, an agreement among the manufacturers not to offer such discounts, and third, an agreement among the manufacturers and the wholesalers to set up an industry-wide system to facilitate the structure of differential pricing necessary to prevent such discounts;
>
> (2) Defendants (both the manufacturers and the wholesalers acting together) conspired to develop and maintain a chargeback system for the explicit purpose of preventing the re-sale of drugs between and among retailers and other drug purchasers and thus assuring that retail pharmacies would not be able to get discounts off list prices on brand name prescription drugs from any source other than the co-conspirator manufacturers and wholesalers;
>
> (3) Defendants (principally the manufacturers but with the knowledge and encouragement of the wholesalers) conspired to increase the prices paid by retail pharmacies for brand name prescription drugs by entering into an unlawful agreement among themselves to raise the prices

of such drugs on the basis of increases in the consumer price index; and

(4) Defendants conspired to make certain that the full burden of these increases in the prices of brand name prescription drugs would fall upon retail pharmacies through an agreement among the manufacturers and the wholesalers that the manufacturers would notify wholesalers of such increases in advance so that the wholesalers could raise their prices before the retail pharmacies knew of the intended price increases and through a further agreement among the wholesalers to coordinate their own price increases so as to avoid competition among themselves.

On April 4, 1996, the district court held that there was ample evidence of the existence of a price-fixing conspiracy and denied the remaining summary judgment motions filed by the manufacturers.[3] However, the court granted the motions for summary judgment filed by drug wholesalers largely on the ground that they acted under the coercion of the drug manufacturers and hence were not voluntary participants in the conspiracy. On the same line of reasoning, the district court also ruled that although *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), ordinarily would limit the plaintiffs' damages to the unlawful overcharges on their purchases made from the manufacturers, the manufacturers exercised so much control over the wholesalers in this case

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[3] In early 1996, the district court granted the summary judgment motion filed by one of the manufacturers, The DuPont Merck Pharmaceutical Company. That ruling was later reversed by the court of appeals. That ruling is not involved in this petition.

that the "owned or controlled" exception to the *Illinois Brick* rule would apply.[4]

At the manufacturers' request, the district court certified its *Illinois Brick* ruling for an interlocutory appeal under 28 U.S.C. §1292, and the court of appeals allowed the manufacturers to appeal that ruling immediately. The district court also made a certification under Rule 54(b) of the Federal Rules of Civil Procedure regarding its dismissal of the claims against the wholesalers, and the retail pharmacies appealed that ruling.[5]

In an opinion dated August 15, 1997, the court of appeals reversed both of the district court's decisions, holding that the power exercised by the drug manufacturers over the drug wholesalers did not bring the situation within the "owned or controlled" exception to *Illinois Brick*, but also holding that this power did not insulate the drug wholesalers from liability for their participation in the conspiracy.[6] *In re Brand Name Prescription Drugs Antitrust Litigation,* 123 F.3d 599 (7th Cir. 1997). The court of appeals held that the evidence presented created a triable issue of fact regarding whether the wholesalers were members of the conspiracy and that the *Illinois Brick* rule would not apply if the jury found that the wholesalers were co-conspirators, for in that

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[4] A copy of the opinion from the district court is included in the Appendix to Petition for a Writ of Certiorari, filed by petitioners on January 6, 1998, at pp. 45a-101a.

[5] The district court's denial of the manufacturers' motions for summary judgment was not appealed.

[6] Two other decisions from the district court were reviewed in that August 15 opinion, including the ruling on DuPont Merck's summary judgment motion, referred to in footnote 3, above. Neither decision is relevant to this petition.

event, the plaintiffs would have purchased directly from the conspiracy.[7] *Id.* at 604, 614.

The case was remanded to the district court, and a jury trial is scheduled for September, 1998. On January 6, 1998, the manufacturers filed this petition.

REASONS FOR DENYING THE WRIT

1. The petition should be denied because it seeks review of an interlocutory ruling that is not appropriate for review by this Court at this time.

This petition for a writ of certiorari seeks to raise a question that is not remotely appropriate for consideration by this Court at this stage of this litigation. The court of appeals' ruling was that *Illinois Brick* will not bar recovery of overcharges paid on purchases from wholesalers if, and only if, those wholesalers are found to have participated in a conspiracy with the manufacturers to fix prices. 123 F.3d at 604. As of yet, there has been no determination that the wholesaler did in fact participate in the conspiracy. Indeed, as of yet, there has been no determination that a conspiracy exists, even among the manufacturers. Both of those issues remain to be resolved at the jury trial that begins in September. Hence the question sought to be presented in the petition is purely hypothetical. Only if the jury finds that there is a conspiracy and that the wholesalers partici-

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[7] Although the question certified was narrow, the entire *Illinois Brick* issue was necessarily before the court, because an appeal certified under 28 U.S.C. § 1292 brings before the court of appeals any issue that is fairly included within the district court order that raises the certified question. *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199 (1996).

pated in that conspiracy, and only if a judgment is entered on that verdict and affirmed on appeal, will the question of the applicability of *Illinois Brick* be presented.

This Court's usual practice is to decline to review interlocutory decisions. See, e.g., *Virginia Military Institute v. United States,* 508 U.S. 946 (1983) (Scalia, J., concurring); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock Railroad Co.,* 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); and *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.,* 148 U.S. 372, 384 (1893). Petitioners have not set forth any reason for departure from this usual practice. The petition does not suggest that any emergency exists, nor does it identify any practical need for interlocutory review. Indeed, the petition does not directly mention the issue of the timing of the review. The only portion of the petition that relates to the timing issue is the suggestion that the court of appeals' decision "will open the floodgates to indirect-purchaser litigation" (Petition at 24). As is shown below, that argument is so plainly overdrawn and so wholly lacking in substance that it does not remotely provide a basis for departure from the Court's usual practice.

2. The petition should be denied because the decision of the court of appeals is consistent with well-established principles of antitrust law and does not conflict with the decision of any other Circuit or this Court.

The court of appeals' decision rests upon a well-established principle of antitrust law—that is, that all of the

participants in a price-fixing conspiracy are jointly and severally liable for all of the damages caused by the conspiracy. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981); *Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). By virtue of that principle, all of the co-conspirators are liable not only for overcharges exacted in their own prices for drugs directly sold to retailers but also for overcharges exacted by other direct-selling participants in the conspiracy. No *Illinois Brick* problem exists because all the purchases in question were made directly from participants in the conspiracy. That is precisely what the court of appeals held and that is all that it held (123 F.3d at 604-05):

> "The indirect-purchaser issue (with which we begin) is separate from the issue of the wholesalers' participation in the manufacturers' alleged conspiracy. It is true that if we reversed the judge's ruling on the latter issue and so reinstated the wholesalers as defendants, and if the plaintiffs went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators. *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212-13 (9th Cir. 1984); *see also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979) (requiring that the direct sellers, here the wholesalers, be joined as defendants—but that requirement is satisfied)."

Although petitioners strive mightily to create the impression that this holding is novel and creates some kind of new exception to *Illinois Brick* (Petition at 14-

18), the fact is that the court of appeals' decision is part of an unbroken line of precedent extending back to the first cases that considered the issue following this Court's decision in *Illinois Brick*. As the court of appeals' decision reflects, both the Seventh Circuit and the Ninth Circuit had previously adopted the view that *Illinois Brick* does not apply where the middleman involved is a participant in the price-fixing conspiracy. *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211-12 (9th Cir. 1984).[8] Numerous district courts have reached the same conclusion.[9] So far as Re-

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[8] This holding also appears in *In re Coordinated Proceedings in Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 228 (C.D. Cal. 1980), *aff'd*, 691 F.2d 1335, 1341-42 (9th Cir. 1982), where the court held that if the co-conspiring middlemen are joined as defendants, *Illinois Brick* will not bar a plaintiff's claim "that the defendant oil companies conspired with retail dealers to set prices at the retail level." Several other courts of appeals that have faced the question have declined to decide it, most often by rejecting a plaintiff's claim because the plaintiff has not joined the allegedly co-conspiring middlemen as defendants in the lawsuit. See *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979); *Jewish Hospital Association of Louisville v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 977 (6th Cir. 1980); *In re Midwest Milk Monopolization Litigation*, 730 F.2d 528, 532 (8th Cir. 1984); *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 933 (3d Cir. 1986); *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842, 854-55 (3d Cir. 1996); and *Austin v. Blue Cross & Blue Shield of Alabama*, 903 F.2d 1385, 1392 (11th Cir. 1990). That mandatory joinder rule has no application to this case, because the plaintiff retailers have sued both manufacturers and wholesalers.

[9] See, e.g., *Gas-A-Tron of Arizona v. American Oil Co.*, 1977-2 Trade Cases (CCH) ¶ 61,789 (D. Ariz. 1977); *Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978); *In re*

(continued...)

spondents are aware, no court has held otherwise. Certainly, petitioners have cited no such holding.

The opinions from these courts are fully consistent with the view expressed by the leading commentators. For example, Professors Areeda and Hovenkamp have explained the reasons why the *Illinois Brick* rule should not apply when the conspiracy also includes the middlemen, using terms very similar to those used by the court of appeals. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application,* ¶ 337.2e (1993 Supplement).

Petitioners' whole argument comes down to an effort to convince the Court that the court of appeals' decision is somehow inconsistent with the reasoning of *Illinois Brick*. Even here, petitioners do not identify any language in *Illinois Brick* that is inconsistent with the court of appeals' decision. Instead, they attempt to create such inconsistency by repeatedly mischaracterizing that decision. Thus petitioners argue that the court of appeals' decision contains a ruling that both direct

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[9] (...continued)
Cement and Concrete Antitrust Litigation, 1978-1 Trade Cases (CCH) ¶ 62,069 (D. Ariz. 1978); *In re Anthracite Coal Antitrust Litigation,* 1978-1 Trade Cases (CCH) ¶ 62,059 (M.D. Pa. 1978); *Reiter v. Sonotone Corp.,* 486 F. Supp. 115 (D. Minn. 1980); *Vermont v. Densmore Brick Co.,* 1980-1 Trade Cases (CCH) ¶ 63,347 (D. Vt. 1980); *Abrams v. Interco., Inc.,* 1980-2 Trade Cases (CCH) ¶ 63,292 (S.D.N.Y. 1980); *In re Mid-Atlantic Toyota Antitrust Litigation,* 516 F. Supp. 1287 (D. Md. 1981); *In re New Mexico Natural Gas Antitrust Litigation,* 1982-1 Trade Cases (CCH) ¶ 64,685 (D. N.M. 1982); *Mekani v. Miller Brewing Co.,* 93 F.R.D. 506 (E.D. Mich. 1982); *New York v. Dairylea Cooperative, Inc.,* 570 F. Supp. 1213 (S.D.N.Y. 1983); and *Whitlock v. Under Sea Industries, Inc.,* 1984-1 Trade Cases (CCH) ¶ 65,847 (C.D. Cal. 1984).

and indirect purchasers may sue to recover the same overcharge (Petition at 14, 18-19, 22 and 23), that the decision necessarily rests on a pass-on of overcharges in violation of *Illinois Brick* (Petition at 3, 7, 11-12, 14, 16-17, 20 and 27), and that the decision somehow makes the retailers' right to recovery contingent on whether there was a settlement between the manufacturers and the wholesalers (Petition at 4, 13-14 and 20-21). None of these characterizations are accurate. And most importantly, none of the petitioners' arguments even attempt to come to grips with the court of appeals' holding that all participants in a price-fixing conspiracy are directly liable for all overcharges imposed by all the members of that conspiracy.

CONCLUSION

For the foregoing reasons, the Class Plaintiff Respondents respectfully request that this Court deny the request for a writ of certiorari.

February 11, 1998

Respectfully submitted,

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